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12 UNITED STATES DISTRICT COURT  
13 EASTERN DISTRICT OF WASHINGTON  
14 SPOKANE DIVISION  
15  
16

17 HECTOR LOYOLA, and LINDA  
18 LOYOLA,

19 Plaintiffs,

20 vs.

21 AMERICAN CREDIT  
22 ACCEPTANCE, LLC, PAR, INC., and  
23 JILLIAN RAE LEE-BARKER dba  
24 COEUR D'ALENE VALLEY  
25 RECOVERY SERVICES,  
26  
27  
28

Defendants.

Case No: 2:19-CV-2

**OPPOSITION TO MOTION TO  
COMPEL ARBITRATION**

4/10/2019  
Without oral argument

1 I. INTRODUCTION

2 This is an action for wrongful repossession brought by a retired couple, Linda  
3 and Hector Loyola, against a subprime lender and its two repossession agencies.  
4 Plaintiffs allege that defendants broke into their locked gate and repossessed their  
5 vehicle. Breaking a gate or lock is a breach of the peace under the UCC in all 50  
6 states, and violates the Consumer Protection Act and the Fair Debt Collection  
7 Practices Act.

8 In 2013, Hector Loyola was forced to retire as a railroad worker, due to a  
9 physical disability. As a result of Hector's retirement, he and his wife Linda lost  
10 significant income, and finally their home to foreclosure. They began living on a  
11 limited pension income in one of the rougher neighborhoods in Spokane. In the fall  
12 of 2016, the Loyolas had a van which was on its last legs, had transmission  
13 problems, would not go up hills, and was incurring them tickets for excessive  
14 smoke. They desperately needed a working car. See Loyola declarations.

15 The Loyolas went to several dealerships but were turned down for credit. On  
16 October 30, 2016, after seeing TV ads by LHM Toyota in Spokane offering to help  
17 consumers with challenged credit, they bought a 2012 Dodge Journey with over  
18 90,000 miles on it. The dealership imposed a 28% interest rate on the Loyolas, and  
19 charged them \$36,000 overall, but they had nowhere else to go.

20 Mrs. Loyola was seriously ill at the time and never went to the dealership.  
21 Instead, the salesman came to the Loyolas home, where they signed the papers in a  
22 rush. The Loyolas never knew they were signing two contracts, a "Retail Purchase  
23 Agreement" ("Buyer's Order") and the retail installment sales contract ("RISC").  
24 They were only aware of the RISC. The dealership did not give them a copy of the  
25 Buyer's Order. The Buyer's Order had an arbitration clause -- in fine print on the  
26 back page, in less than the eight point type required by Washington law. The RISC  
27 -- the only contract the Loyolas knew about -- does not have an arbitration clause.

28 The dealership never told the Loyolas about their right under Washington law

1 to cancel the transaction within three days, under Washington’s home solicitation  
2 statute. The dealership also violated Washington’s “single document rule” by  
3 having the Loyolas sign two separate contracts, when only one was permitted.

4 LHM Toyota assigned the RISC to defendant American Credit Acceptance,  
5 LLC (“ACA”), but not the Buyer’s Order. The assignment box in the RISC reflects  
6 that ACA is the assignee, but the Buyer’s Order does not contain a similar  
7 assignment. Compare Docket No. 8-1 with Docket No. 8-2.

8 The Loyolas made payments under the RISC, but after two years, they had  
9 fallen behind. In November, 2018, ACA hired defendant Par, Inc., a national  
10 repossession agency in Indiana, to repossess the Dodge. Par in turn contracted with  
11 defendant Jillian Rae Lee-Barker, a resident of Idaho, to physically repossess the  
12 vehicle.

13 According to the California Department of Consumer Affairs, defendant Lee-  
14 Barker had her California repossession license revoked in November, 2017 for  
15 three separate incidents of having unlawfully entered secured areas to repossess a  
16 vehicle. See Request for Judicial Notice, Exhs. 1-2. In addition, the Department of  
17 Consumer Affairs accused Lee-Barker’s agency of using violence during  
18 repossessions and failing to report that violence, and that Lee-Barker herself  
19 personally threatened to send someone over to “take care of” one debtor and his  
20 family if he reported a beating by one of her repossessors (her husband). Defendant  
21 Lee-Barker admitted all of these allegations, except the threat to harm the debtor.  
22 Id. The California authorities revoked Lee-Barker’s license, which was stayed for a  
23 three year probationary period. Id.

24 Instead of completing her probation, Lee-Barker fled to Idaho and opened up  
25 a new repossession agency under the fictitious name, “Cour D’Alene Valley  
26 Recovery Services,” which she now runs out of her parent’s remote country home  
27 in Idaho. Unlike California, Idaho does not license or regulate repossession  
28 agencies, leaving Lee-Barker free to operate without further unwanted scrutiny.

1 The Loyolas always kept their vehicle behind a locked metal gate, with a  
 2 padlock, because thefts occur often in their neighborhood. On November 26, 2018,  
 3 Defendant Lee-Barker's employee arrived at the Loyola's home, broke the metal  
 4 latch off the Loyola's locked gate, repossessed the vehicle, and stole the broken  
 5 latch, leaving the still-closed padlock attached to the other side of the gate.  
 6 Plaintiffs allege this was a breach of the peace in violation of RCW § 62A.9A-  
 7 609(b)(2). The result is that the defendant ACA must pay the Loyolas statutory  
 8 penalties under the UCC, and the defendant repossession agencies have violated the  
 9 Fair Debt Collection Practices Act, 15 U.S.C. § 1692f(6).

10 The present motion to compel arbitration should be denied. Defendants are  
 11 strangers to the agreement, and have no standing to compel arbitration. The  
 12 arbitration clause in the Buyer's Order expressly states that the dispute resolution  
 13 procedures of the RISC control in case of a conflict, and the RISC chooses court as  
 14 the dispute forum. The Buyer's Order is also nullified by the integration clause in  
 15 the RISC. The Buyer's Order is also unenforceable for violations of Washington's  
 16 "single document rule," and because it is procedurally and substantively  
 17 unconscionable. The clause contains a laundry list of one-sided and harsh  
 18 provisions, all designed to reserve court exclusively for the creditor, while  
 19 imposing an arbitration with grossly unfair procedural rules on the consumer.

## 20 II. ARGUMENT

### 21 A. None Of The Defendants Has Standing To Compel Arbitration

22 None of the defendants signed any arbitration clause, and none has standing  
 23 to compel arbitration here. The general rule is that "[O]ne must be a party to an  
 24 arbitration agreement to be bound by it or invoke it. The strong public policy in  
 25 favor of arbitration does not extend to those who are not parties to an arbitration  
 26 agreement, and a party cannot be compelled to arbitrate a dispute that he has not  
 27 agreed to resolve by arbitration." Murphy v. DirecTV, Inc., 724 F.3d 1218 (9th Cir.  
 28 2013). "The right to compel arbitration stems from a contractual right" that "may

1 not be invoked by one that is not a party to the agreement and does not otherwise  
2 possess the right to compel arbitration.” Britton v. Co-op Banking Group, 4 F.3d  
3 742, 744 (9th Cir, 1993). The only exception to this rule would be if a “preexisting  
4 confidential relationship, such as an agency relationship between the nonsignatory  
5 and one of the parties to the arbitration agreement, makes it equitable to impose the  
6 duty to arbitrate upon the nonsignatory.” Murphy v. DirecTV, 724 F.3d at 1232.  
7 But none of the defendants here had any preexisting confidential relationship with  
8 LHM Toyota, the entity which signed the Buyer’s Order containing the arbitration  
9 clause.

10 Defendant ACA claims a confidential relationship with LHM Toyota because  
11 it says it is an “assignee.” But ACA was an assignee *only of the RISC*, and the  
12 RISC does not contain an arbitration clause. The Buyer’s Order contains no  
13 assignment box (Docket No. 8-1), whereas the RISC does contain one, which states  
14 “Seller assigns its interest in this contract to American Credit Acceptance under the  
15 terms of Seller’s agreement(s) with Assignee.” Docket No. 8-2. ACA has presented  
16 no evidence that it was ever assigned the Buyer’s Order. Indeed, there would be no  
17 reason to assign the Buyer’s Order to ACA in the first place, as the RISC is the loan  
18 document, sets out the payment schedule, and is the legal document which ACA  
19 would enforce against the Loyolas in the event of a default. Logically, that is why  
20 the RISC has the assignment box, and the Buyer’s Order does not. Conspicuously  
21 missing from ACA’s declaration is a copy of its master assignment agreement with  
22 LHM Toyota (referenced as “Seller’s agreement(s) with Assignee” in the  
23 assignment box), which would presumably explain exactly what ACA was taking  
24 assignment of.

25 None of the defendants has met their burden to show they were an agent of  
26 LHM Toyota either. Plaintiff alleged in the complaint that all defendants were  
27 agents of *each other*, but not that any of them were agents of LHM Toyota, the  
28 signatory to the Buyer’s Order. Complaint, ¶ 10. Moreover, such general agency

allegations in a complaint are insufficient to meet the defendant's burden to show agency when moving for arbitration. Roes v. SFBSC Management, LLC, 656 Fed.Appx. 828 (9th Cir. 2016).<sup>1</sup> Rather, the non-signatory defendant has the burden to prove through its own agreements and conduct, that there was *control* sufficient to be an agent of a signatory. Murphy v. DirecTV, Inc., 724 F.3d 1218, 1232–33 (9th Cir. 2013) (refusing to allow Best Buy to compel arbitration as an agent, because “Best Buy has presented no evidence ... that DirecTV controlled its behavior in ways relevant to Plaintiffs' allegations”). There is no evidence of control by LHM Toyota over any of the defendants, nor that non-signatory ACA had control over defendants Par or Lee-Barker. Defendants' failure to produce their respective business agreements with each other is telling, for these agreements likely recite that the repossession agents were acting as independent contractors.

Nor can defendants invoke the doctrine of equitable estoppel to gain standing. “Because generally only signatories to an arbitration agreement are obligated to submit to binding arbitration, equitable estoppel of third parties in this context is narrowly confined.” Murphy v. Directv, Inc., 724 F.3d 1218, 1229 (9th Cir. 2013) (citing Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042, 1046 (9th Cir. 2009)). A nonsignatory to an arbitration agreement may equitably estop a signatory from avoiding arbitration “only under two very specific conditions:

(1) when a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are intimately founded in and intertwined with the underlying contract, and (2) when the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory and the allegations of interdependent misconduct are founded in or intimately connected with the obligations of the underlying agreement.

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<sup>1</sup> See also Swift v. Zynga Game Network, Inc., 805 F.Supp.2d 904, 916 (N.D. Cal. 2011) (declining to treat “agency” allegations as binding where defendants denied that they were agents and discovery subsequently revealed that the defendants were actually “independent contractors”); Nat'l Abortion Fed'n v. Ctr. for Med. Progress, 134 F.Supp.3d 1199, 1205–06 (N.D. Cal. 2015) (declining to treat alter ego allegations in complaint as binding judicial admissions on an issue for which defendants later had the burden of proof).

1 Id. (citing Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1128-29 (9th Cir. 2013)).  
2 “This rule reflects the policy that a plaintiff may not, on the one hand, seek to hold  
3 the nonsignatory liable pursuant to duties imposed by the agreement, which  
4 contains an arbitration provision, but, on the other hand, deny arbitration’s  
5 applicability because the defendant is a non-signatory.” Id.

6 The Ninth Circuit has consistently rejected the equitable estoppel doctrine in  
7 the arbitration context, making it clear that a non-signatory defendant has a heavy  
8 burden to compel arbitration under this theory: “We have never previously allowed  
9 a non-signatory defendant to invoke equitable estoppel against a signatory plaintiff,  
10 and we decline to expand the doctrine here.” Rajagopalan v. Note World, LLC, 718  
11 F.3d 844, 847 (9th Cir. 2013).

12 The required elements of equitable estoppel are not met here. Plaintiffs are  
13 not relying on the terms of the Buyer’s Order to assert any claim in the complaint,  
14 nor are plaintiffs’ claims intimately intertwined with the Buyer’s Order. Plaintiff’s  
15 claims are all based on statutory, not contractual duties: i.e. the UCC, Consumer  
16 Protection Act, and FDCPA. Plaintiffs do not even make reference to the Buyer’s  
17 Order, an irrelevant document, because it was the RISC that governed the  
18 relationship between plaintiffs and ACA. The RISC has no arbitration clause, and  
19 ACA was enforcing the RISC when it ordered a repossession.

20 Plaintiffs’ complaint makes no reference to any agreement with an arbitration  
21 clause. Even if it had though, “Merely making reference to an agreement with an  
22 arbitration clause is not enough. Equitable estoppel applies when the signatory to a  
23 written agreement containing an arbitration clause must rely on the terms of the  
24 written agreement in asserting its claims against the nonsignatory.” Kramer, 705  
25 F.2d at 1129. In Kramer, purchasers of Toyota vehicles brought a class action  
26 against Toyota the manufacturer for allegedly including a defective braking system  
27 in the vehicles. 705 F.3d at 1124. Each class member signed a purchase agreement  
28 containing an arbitration clause with a Toyota dealer. Id. at 1124-25. Although the



1 manufacturer was not a signatory to the purchase agreements, it sought to enforce  
2 the arbitration agreements, arguing plaintiffs were equitably estopped from  
3 asserting the manufacturer's nonsignatory status as a bar to compelling arbitration.  
4 Id. at 1125-1126.

5 The Ninth Circuit disagreed with the manufacturer, and even though plaintiff  
6 had asserted breach of warranty claims, held that plaintiffs' claims against the  
7 manufacturer did not rely on any provision in the purchase agreements and, instead,  
8 were based on the manufacturer's independent duties owed to the customers. 705  
9 F.3d at 1128-1134. In so ruling, the Ninth Circuit rejected the manufacturer's  
10 argument that plaintiffs' claims were necessarily intertwined with the purchase  
11 agreements because the lawsuit was predicated on the fact a vehicle purchase  
12 occurred. Id. at 1131-1132. The court explained that although plaintiffs' causes of  
13 action presumed a vehicle sale, the claims did not rely upon the existence of the  
14 purchase agreement, and instead the causes of action arose under state laws or  
15 duties to the plaintiffs that were independent from the underlying purchase  
16 agreements. Id. at 1130-1131.

17 The Ninth Circuit relied on its holding in Kramer to reach a similar  
18 conclusion in Murphy, 724 F.3d 1218. In Murphy, customers alleged that Best Buy  
19 and DirecTV worked together to defraud and mislead DirecTV purchasers in  
20 violation of certain consumer protection statutes. Id. at 1223-24. DirecTV's  
21 "Customer Agreement" had an arbitration agreement with the consumers and it  
22 precluded class actions. Id. at 1224. Best Buy was not a party to the Customer  
23 Agreement. Yet, Best Buy moved to compel arbitration under the agreement and  
24 the district court granted the motion, finding that equitable estoppel compelled that  
25 result. Id. at 1228-29. The Ninth Circuit reversed, finding that plaintiffs' claims  
26 against Best Buy did not rely on the substance of their agreement with DirecTV,  
27 since the claims focused on alleged misrepresentations by Best Buy in selling the  
28 product. 724 F.3d at 1230-31. In the court's words, none of plaintiffs' allegations



1 “rely on the Customer Agreement or attempt to seek any benefit from its terms.” Id.  
 2 at 1230. The court specifically rejected Best Buy’s argument that equitable estoppel  
 3 applied because plaintiffs’ claims depended on the existence of the DirecTV  
 4 agreement:

5 [As in Kramer], here, the Customer Agreement proves at  
 6 most the existence of a transaction; Plaintiffs’ claims do not  
 7 depend on the Agreement’s terms. The UCL and CLRA allow  
 8 Plaintiffs to sue Best Buy for misleading consumers  
 regardless of whether or not they signed largely unrelated  
 contracts with DirecTV.

9 Id. at 1231.

10 Here, the Buyer’s Order “proves at most the existence of a transaction.”  
 11 Murphy, 724 F.3d at 1231. Plaintiff’s claims do not “rely on” any term of the  
 12 Buyer’s Order. Plaintiff does not seek to enforce the terms, duties or obligations of  
 13 that document or the RISC, against any party. Plaintiff’s claims are instead brought  
 14 for violations of independent duties contained in three statutes, the UCC, the CPA,  
 15 and the FDCPA.

16 B. The Arbitration Clause Is Inapplicable By Its Own Language

17 1. *The Buyer’s Order Expressly Adopts Court As The Chosen Forum*

18 The Buyer’s Order states that the parties must arbitrate any dispute between  
 19 them relating to “the Retail Installment Contract (except where such Contract  
 20 includes its own dispute resolution provision, in which case such provisions shall  
 21 control any claim arising under or relating to said Contract).” Docket No. 8-1,  
 22 “Agreement to Arbitrate,” ¶ 1. Under this language, the Buyer’s Order specifically  
 23 provides that its dispute resolution procedures (i.e. arbitration) do not apply if there  
 24 are different dispute resolution procedures set forth in the RISC.

25 That is the case here. The Loyola RISC expressly contemplates only *court*  
 26 *action* to enforce its provisions. There is no mention of arbitration. The RISC  
 27 states that if the borrower breaches, he will have to pay reasonable attorneys fees  
 28 “and court costs.” Docket No. 8-2, back page, ¶ 3c. The RISC also states that if the

1 vehicle is repossessed and sold, the borrower will have to pay such “attorneys fees  
 2 and court costs the law permits.” *Id.*, ¶ 3f. Such references to court costs or court  
 3 actions indicate that the parties intended court, not arbitration, as their chosen  
 4 forum. State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders,  
 5 228 W.Va. 125, 717 S.E.2d 909 (W. Va., 2011)(references to possibility of “court  
 6 action” negated arbitration clause, creating ambiguity to be construed against the  
 7 drafter).

8 The plain language of the Loyola Buyer’s Order thus mandates that the  
 9 Loyola RISC controls in case of a conflict as to dispute resolution. The RISC  
 10 governs.

11 *2. The Arbitration Clause Expressly Excludes Plaintiffs’ Claims Against The*  
 12 *Non-Signatory Defendants*

13 The arbitration clause in the Buyer’s Order is limited to disputes between  
 14 LHM Toyota and plaintiffs, of which there are none: “*Purchaser(s) and Dealer*  
 15 (“Parties) agree, except as otherwise provided in this Arbitration Provision, to  
 16 resolve by binding arbitration any *Dispute* that arises *between them* under or  
 17 relating to this Agreement . . .” Docket No. 8-2, ¶ 20 (emphasis added).

18 The italicized words show that plaintiff’s claims in the complaint are not  
 19 covered by the arbitration clause. The term “Purchaser(s)” is defined on the front  
 20 of the Buyer’s Order to be Hector and Linda Loyola, under “Purchaser’s Names.”  
 21 Docket No. 8-1, first page, top. The term “Dealer” is never defined, but the dealer  
 22 is listed on the front of the agreement as “LHM Toyota Spokane.” The term  
 23 “Dispute” is never defined.

24 The key limiting words in this arbitration clause are “*between them*,” which  
 25 plainly affords coverage only to disputes between “Purchaser(s)” (the Loyolas) and  
 26 “Dealer” (LHM Toyota Spokane). Disputes between the Loyolas and *third parties*,  
 27 such as any alleged assignees of the dealer, or an assignee’s independent contractor  
 28 repossession agencies, are not within the scope of the clause. Such disputes could

1 easily *have been* included by defining third parties to come within the definition of  
 2 “Dealer,” or within the definition of “Dispute.” But this contract doesn’t do that.  
 3 Any ambiguity due to the undefined special terms should be construed against the  
 4 drafter, and in favor of plaintiffs, who did not draft this adhesion contract.

5 C. The Arbitration Clause Is Illegal Under The Single Document Rule

6 Washington, like several other states, prohibits automobile sales from being  
 7 memorialized in more than one document: “Every retail installment contract shall  
 8 be contained in a single document which shall contain the entire agreement of the  
 9 parties including any promissory notes or other evidences of indebtedness between  
 10 the parties relating to the transaction . . .” RCW § 63.14.020.

11 The purpose of the single document requirement is to protect buyers from the  
 12 deception and ambiguities which arise when more than one document is utilized to  
 13 express the contract. The courts have thus overwhelmingly held that when the seller  
 14 has violated the single document rule, and there is both a RISC and a separate  
 15 agreement with an arbitration clause, the RISC governs and the separate arbitration  
 16 agreement is illegal and unenforceable. Lambert v. National Motors, Inc., 2011  
 17 WL 1704726 (D. Md. May 4, 2011)(Maryland’s single document rule precluded  
 18 enforcement of arbitration clause in sales contract, because “the agreements within  
 19 the four corners of the installment contract are the only agreements that apply to the  
 20 transaction, and the arbitration clause is not one of them.”); Rugumbwa v. Betten  
 21 Motor Sales, 136 F.Supp.2d 729, 732-33 (W.D. Mich., 2001)(holding that an  
 22 arbitration provision included in the auto sales contract, but not in the retail  
 23 installment contract, is unenforceable under Michigan’s single document rule);  
 24 Gibbs-Bolender v. CAG Acceptance, LLC (D. Nev., February 18, 2015), at p. 9  
 25 (noting that most courts have held that a state’s single document rule voids any  
 26 separate arbitration agreements); Larkin v. New Century Auto Sales Inc., No. 12-  
 27 13917, 2014 WL 29119, at \*12 (E.D. Mich. Jan. 3, 2014) (“the stand alone  
 28 Arbitration Agreement is unenforceable as a matter of law because it is a stand

alone document and not part of the retail installment sales contract as required pursuant to MVSFA”); Knight v. Springfield Hyundai, 81 A.3d 940, 948-49 (Pa. Super. Ct. 2013)(no enforceable arbitration agreement under Pennsylvania’s single document rule when purchase order contains arbitration, and retail installment sales contract does not); Baker v. Antwerpen Motorcars Ltd., 807 F. Supp. 2d 386, 390 (D. Md. 2011)(same).

#### D. The Integration Clause Of The RISC Nullifies The Buyer’s Order

Even in states without a single document rule in their retail installment sales law, the courts apply ordinary contract interpretation principles to refuse to enforce arbitration clauses when there exists both a sales contract (with arbitration) and a retail installment sales contract (without arbitration). As stated in one of the leading arbitration treatises: “Thus, if a car dealer places an arbitration agreement in the sales order or other preliminary document but not in the final installment sales agreement, the arbitration agreement is not part of the final transaction and is not binding on the consumer.” National Consumer Law Center, Consumer Arbitration Agreements, § 6.9.4.2 (7th Ed. 2015).

These courts rely upon the integration clause of the RISC to hold that all the parties’ agreements are contained only in the RISC. See Knight v. Springfield Hyundai, 81 A.3d 940, 948 (Pa. Super. Ct. 2013)(integration clause in retail installment sales contract superceded arbitration clause in sales order); Davis v. KB Home of South Carolina Inc., 713 S.E.2d 799, 806 (S.C. App., 2011)(arbitration clause in employment application was superceded by an employment agreement with no arbitration clause); Patton v. Jeff Wyler Eastgate, Inc., 608 F.Supp.2d 907 (S.D.Ohio 2007)(RISC is the operative document, not the buyer’s order).

The case of Duval Motors Co. v. Rogers, 73 So.3d 261, 265-69 (Fla. App., 2011) is particularly instructive, because like this case, the plaintiffs brought claims for wrongful repossession against the lender, which the lender sought to compel to arbitration. There was a RISC and a buyer’s order, with only the buyer’s order

1 containing arbitration. The Duval court concluded that the integration clause in the  
 2 RISC and the parol evidence rule prevented the buyer's order (RBO) from being  
 3 enforceable. The court noted that "the important inquiry is whether the RISC  
 4 incorporates the RBO, not whether the RBO incorporates the RISC. The RISC does  
 5 not mention the RBO. As a result, the RBO is irrelevant to the disputes arising out  
 6 of the transaction at issue." Id. at 269.

7 This case is no different from Duval. The Loyola RISC contains an  
 8 integration/merger clause which states: "This contract contains the entire agreement  
 9 between you and us relating to this contract." Docket No. 8-2, page 1, "How This  
 10 Contract Can Be Changed." The Loyola RISC nowhere mentions or incorporates  
 11 by reference the Buyer's Order. And, the Buyer's Order specifically states that the  
 12 RISC controls in case of conflict. Docket No. 8-1, "Agreement to Arbitrate," ¶ 1).  
 13 Under the above authorities, the RISC is the only operative document in the  
 14 Loyolas' case, and it contains no arbitration clause.

#### 15 E. The Arbitration Agreement Is Procedurally Unconscionable

16 Under Washington law, a contract may be invalid based on either substantive  
 17 or procedural unconscionability. Al-Safin v. Circuit City Stores, Inc., 394 F.3d  
 18 1254, ¶ 22 (9th Cir. 2005); Zuver v. Airtouch Communications, Inc., 153 Wash.2d  
 19 293, 303 (2004). Procedural unconscionability is the lack of meaningful choice,  
 20 considering all the circumstances surrounding the transaction including (1) the  
 21 manner in which the contract was entered, (2) whether each party had a reasonable  
 22 opportunity to understand the terms of the contract, and (3) whether the important  
 23 terms were hidden in fine print. Torgerson v. One Lincoln Tower, LLC, 166  
 24 Wash.2d 510, 518-519 (2009); Zuver, 153 Wash.2d at 303. Whether a contract is  
 25 one of adhesion depends upon an analysis of the following factors: "(1) whether the  
 26 contract is a standard form printed contract, (2) whether it was prepared by one  
 27 party and submitted to the other on a take it or leave it basis, and (3) whether there  
 28 was no true equality of bargaining power between the parties." Zuver, at 304.

1 All of these factors point to a great deal of procedural unconscionability in  
2 this case, as explained below.

3 • Unequal bargaining power. The Loyolas are a couple living on limited  
4 retirement income who were desperate for a vehicle, as their old van was not  
5 operating properly, they were in financial difficulty, they had challenged credit, and  
6 had been turned down for credit by other dealerships. Loyola Decls., ¶¶ 2-5. Mrs.  
7 Loyola was also quite physically ill at this time. Linda Loyola Decl., ¶ 7. The  
8 Loyolas accepted a 28% interest rate just to buy a used beater with 90,000 miles on  
9 it, for a total cost of almost \$36,000.

10 • “Take it or leave it” contract. The pre-printed papers were drafted by the  
11 dealership with no opportunity to interlineate oppressive provisions. Loyola Decls.,  
12 ¶ 9.

13 • Fine print. The arbitration clause appears on the back of the Buyer’s Order  
14 in tiny print. The version produced by ACA is admittedly *enlarged*, yet the print is  
15 *still* less than the minimum eight-point print required by the Washington Retail  
16 Installment Sales Act. RCW § 63.14.020.

17 • No copy given. In violation of RCW § 63.14.030, the salesperson did not  
18 leave a copy of the Buyer’s Order with the Loyolas, and the acknowledgment of  
19 receiving a copy violates the law, for it is in less than ten point type, and not  
20 bolded. RCW § 63.14.030. Loyola Decls., ¶ 8.

21 • Surprise. The salesperson never mentioned that the Buyer’s Order contained  
22 an arbitration clause. Indeed, the Loyolas had no idea they were even signing two  
23 separate contracts. Loyola Decls., ¶ 8. The arbitration clause has no space for the  
24 buyer to initial, which might have called attention to it.

25 • Home solicitation. The contract was signed at plaintiffs’ home, which the  
26 Washington Legislature considers to be a pressured environment for the consumer,  
27 who may sign without adequate negotiation, just to get the salesperson to leave  
28 their private space. The home solicitation act provides for a three-day right to

1 cancel transactions consummated in the home, yet the salesperson never disclosed  
2 this right to the Loyolas. RCW § 63.14.154(1)(a); Loyola Decls., ¶ 8.

3 • Time pressure. The salesperson told the Loyolas she was concerned about  
4 coming alone to their home because of the bad neighborhood, and they would have  
5 to sign quickly. Hector Loyola Decl., ¶ 7. Linda was not in the room when the  
6 terms of the transaction were discussed, and merely signed where she was told.

7 Linda Loyola Decl., ¶ 10.

8 • Yo-yo auto sale. In a yo-yo auto sale, the dealership gives possession of the  
9 car to the buyer for a few days before consummating the contract. This puts  
10 pressure on the consumer to go through with the deal, after enjoying the car and  
11 having shown it already to friends and family. The dealership gave possession of  
12 the car to the Loyolas about three days before coming to their home for signing.

13 Loyola Decls., ¶ 6.

14 • Single document rule violation. The dealership violated the single  
15 document rule by having the Loyolas sign multiple agreements. RCW § 63.14.020.

16 F. The Arbitration Agreement Is Substantively Unconscionable

17 Substantive unconscionability alone is sufficient to render a contract invalid.

18 Kam-Ko Bio-Pharm Trading Co., Ltd v. Mayne Pharma (USA) Inc., 560 F.3d 935,  
19 940 (9th Cir. 2009); Adler v. Fred Lind Manor, 153 Wash.2d 331, 346-47, 103 P.3d  
20 773 (2004). Substantive unconscionability arises in those cases where a clause or  
21 term in the contract is one-sided or overly harsh. Torgerson v. One Lincoln Tower,  
22 LLC, 166 Wash.2d 510, 519, 210 P.3d 318 (2009).

23 There are numerous oppressive and one-sided provisions hidden in the fine  
24 print of the Buyer's Order. They reflect a concerted plan to extinguish various  
25 statutory rights of the Loyolas, tilt the playing field in arbitration, and reserve the  
26 court system for the key claims the dealership might need to bring. Together, these  
27 provisions shock the conscience and permeate the contract with unconscionability.

28



1           *1. Creditor Retains Court Rights For Repo, Replevin, Provisional Remedies*

2           The quintessential unconscionable one-sided arbitration clause relegates the  
3 weaker party's claims to arbitration, while reserving the most important claims of  
4 the more powerful party for the court system. The Buyer's Order does exactly this  
5 by permitting the dealer to exercise provisional remedies related to the collateral in  
6 court, such as repossession, replevin, or injunctive relief. The Buyer's Order  
7 accomplishes this with the following language: "The Parties retain the right to  
8 exercise self-help or provisional remedies, such as repossession, and to file a  
9 replevin action in court." Docket No. 8-1, ¶ 20, first stanza. Although facially  
10 neutral, in the real world a consumer never has a replevin, injunction, or self-help  
11 repossession remedy relating to the collateral. These are remedies needed only by  
12 the dealership, to enforce the contract after default and protect the dealer's interests.  
13 At the same time, all of the consumer's possible claims relating to a repossession,  
14 such as for breach of the peace or wrongful repossession without default, are  
15 relegated to arbitration.

16           Time and again, courts have struck down similar one-sided provisions which  
17 reserve the the dealer's right to bring replevin or provisional remedies in court.  
18 Cisneros v. American Gen. Fin. Servs., Inc., Case No. C 11-02869 CRB (N.D. Cal.,  
19 July 23, 2012)(arbitration provision which permitted creditor self-help repossession  
20 and judicial remedy of replevin lacked bilaterality and was unduly one-sided and  
21 harsh, for these "are the only practical remedies Defendant would ever seek against  
22 consumers"); Jones v. Wisconsin Auto Title Loans, Inc., 714 N.W.2d 155, at pp.  
23 172-174 (Wisconsin Supreme Court 2006)(arbitration provision which excepted  
24 title lender's debt collection remedies from arbitration, including replevin, and  
25 relegated consumer's claims to arbitration, was unconscionable); Taylor v. Butler,  
26 142 S.W.3d 277, 286 (Tenn., 2004)("City Auto has a judicial forum for practically  
27 all claims that it could have against Taylor. Indeed, it is hard to imagine what other  
28 claims it would have against her other than one to recover the vehicle or collect a

1 debt. At the same time, Taylor is required to arbitrate any claim that she might have  
 2 against City Auto”); Hopkins v. New Day Financial, 643 F.Supp.2d 704, 719-720  
 3 (E.D. Pa., 2009) (clause which reserved court for replevin and judicial foreclosure  
 4 remedies “has the effect of arbitrarily permitting Defendant New Day to access the  
 5 court system without providing Plaintiffs with the same benefit”); Williams v.  
 6 Aetna Fin. Co., 83 Ohio St.3d 464, 700 N.E.2d 859, 866 (1998) (clause that  
 7 required all disputes “other than judicial foreclosures and cancellations regarding  
 8 real estate security” to be resolved in arbitration was unconscionable); Arnold v.  
 9 United Cos. Lending Corp., 204 W.Va. 229, 511 S.E.2d 854, 861-62 (1998) (lender  
 10 retained the right to a judicial forum for purposes of provisional remedies);  
 11 Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778, 784-86 (9th Cir.2002)  
 12 (holding unconscionable under California law employment contract compelling  
 13 arbitration of claims employee most likely to bring against employer, but not claims  
 14 employer most likely to bring against employee).

### 15 *2. Extinguishes Consumer’s Statutory Right to Fees and Costs*

16 The arbitration clause states “Each party shall be responsible for its own  
 17 attorneys and expert fees and any other costs incurred.” Docket No. 8-1. This  
 18 removes the Loyola’s statutory right to attorneys fees under the FDCPA and the  
 19 CPA, even if they were to prevail in the arbitration. The provision therefore strips  
 20 the Loyolas of fundamental statutory rights, and is unconscionable.

### 21 *3. Allows Arbitrator To Impose Defendants’ Fees and Costs On Plaintiffs*

22 The arbitration clause provides: “The arbitrator may decide which party is  
 23 responsible for paying any costs and fees as part of the decision and award.” This  
 24 provision is one-sided for it strips plaintiffs of major protections in the FDCPA and  
 25 CPA. The FDCPA allows attorneys fees to the prevailing defendant only if the  
 26 plaintiff’s claims are in bad faith and brought to harass. 15 U.S.C. § 1692k(a)(3).  
 27 The CPA is a one-way fee shifting statute, and does not permit the defendant to  
 28 recover fees at all. RCW § 19.86.090. This provision therefore strips out these

1 essential protections against a fee award being entered against a losing plaintiff.  
2 The clause is a major deterrent to a claim even being brought by a consumer, who  
3 may not want to risk a catastrophic judgment, despite owning a valid claim. On the  
4 other hand, this provision doesn't affect the corporate defendant, who is already  
5 liable under the FDCPA and CPA for the attorneys fees of the consumer, upon  
6 losing a case.

7 *4. Requires Consumer To Bear Costs Of A Successful Appeal*

8 The arbitration clause states: "The cost of appeal shall be born by the  
9 appealing party." Docket No. 8-1. This provision is one-sided, for it means that  
10 even if the consumer wins an appeal in court, and overturns a defective arbitration  
11 award, he or she must bear his own costs for bringing that appeal. The provision  
12 turns successful consumer appeals into pyrrhic victories, and negates applicable  
13 consumer fee/cost shifting statutes (which apply to appeals). On the other hand, the  
14 provision is no deterrent to corporate litigants bringing an appeal, who normally  
15 have to bear their own fees and costs anyway, upon winning an appeal.

16 *5. Requires Consumer To Pay Fees and Costs Of An Unsuccessful Appeal*

17 The arbitration clause provides: "If a party unsuccessfully challenges the  
18 arbitrator's award or fails to comply with it, the other Party is entitled to recover the  
19 costs, including reasonable attorneys' fees, of defending or enforcing the award."  
20 This provision is also harsh and one-sided in effect. A consumer who loses an  
21 appeal under CPA is not responsible for the other party's fees and costs, and not  
22 responsible under the FDCPA unless the appeal is in bad faith. This provision  
23 heavily penalizes an unsuccessful non-frivolous appeal by the consumer, who not  
24 only must bear their own fees and costs, but now must pay the corporation's  
25 attorneys fees and costs. That would not happen after an unsuccessful appeal under  
26 the FDCPA or CPA. Defendants are not affected at all by this provision, as they  
27 already have to pay the consumer for his/her fees and costs upon losing an appeal.  
28

1           6. *Prohibits Protections Against Unconscionability Offered By The*  
 2 *Arbitration Forum*

3           This arbitration clause guarantees its own oppressive provisions, by stating  
 4 that in the case of a conflict between the contract and the rules of the arbitral forum,  
 5 the contract governs. Docket No. 8-1. Thus if an arbitration forum has a rule  
 6 prohibiting a corporate defendant from recovering costs or fees from the consumer  
 7 claimant unless the claim was frivolous, that rule doesn't apply and the defendant  
 8 can still insist on being paid fees and costs for winning a non-frivolous claim. The  
 9 defendant could also insist that the consumer pay the defendant's costs of an  
 10 unsuccessful appeal by the consumer, even if the arbitration forum prohibits this.  
 11 Arbitration forums are not known for their consumer-friendly rules, but if they do  
 12 have them, this provision takes care of the problem for the creditor.

13 G.   The Court, Not The Arbitrator, Must Decide This Motion

14           1. *Non-Signatories Cannot Invoke A Delegation Clause*

15           Arbitrability is a "gateway" issue that is presumptively to be resolved only by  
 16 the court. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002). The  
 17 Ninth Circuit rule is that a non-signatory cannot invoke a provision delegating  
 18 validity and formation issues to the arbitrator. Kramer v. Toyota Motor Corp., 705  
 19 F.3d 1122, 1126-27 (9th Cir. 2013)("[Delegation] provisions are part of the  
 20 agreement and only apply to signatories. Toyota cannot invoke the right to the  
 21 benefits of the Purchase Agreement because it was not a party to the agreement;  
 22 thus, the threshold issue of whether Toyota, as a nonsignatory, may compel  
 23 Plaintiffs to submit to arbitration under the Purchase Agreements must be decided  
 24 by this Court").

1           2. *No Clear and Unmistakable Delegation*

2           Plaintiffs' opposition presents several gateway issues,<sup>2</sup> which may be referred  
3 to an arbitrator only if there is "clear and unmistakable" evidence that the parties  
4 agreed to this. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-45  
5 (1995). The clause in this case is not clear and unmistakable.

6           As explained above, the delegation clause was hidden in tiny type on the back  
7 of the Buyer's Order. The typeface was required to be at least eight point. RCW §  
8 63.14.020. Defense counsel admits to enlarging the Buyer's Order by an order of  
9 magnitude, but even the enlarged copy presented to the court is very tiny and hard  
10 to read, far less than eight point type. Plaintiffs also were not given a copy of the  
11 delegation clause in violation of RCW § 63.14.030. The agreement to delegate  
12 arbitrability was therefore not the "clear and unmistakable" one required to rebut  
13 the presumption that the court must decide gateway issues.

14           3. *Delegation Clause Is Unenforceable Under The Single Document Rule*

15           Even if the parties clearly and unmistakably agree to delegate arbitrability,  
16 the court must still decide any challenge to the enforceability of the delegation  
17 clause itself. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 70 (2010).

18           No agreement to delegate arbitrability ever formed here under Washington  
19 contract law, because the delegation clause was prohibited by the single document  
20 rule, being in a separate agreement. Plaintiffs assert the provision is illegal, and the  
21 court must decide the illegality issue. See Gibbs-Bolender v. CAG Acceptance,  
22 LLC (D. Nev., February 18, 2015)(argument that delegation clause was never  
23 formed due to violation of single document rule was "an independent and severable  
24 challenge to the delegation provision" which had to be decided by the court).

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26           <sup>2</sup> When one agreement contains an arbitration clause and a second agreement does not,  
27 the legal question before the court is one of contract formation, not the scope of the  
28 clause. Applied Energetics, Inc. v. Newoak Capital Markets, LLC, 645 F.3d 522, 526  
(2nd Cir. 2011); Davis v. KB Home of South Carolina Inc., 713 S.E.2d 799, 804 (S.C.  
App., 2011)(dueling contracts issue is a "gateway" matter for the court to decide).

1           4. *Delegation Clause Is Substantively Unconscionable*

2           The delegation clause is also substantively unconscionable. Plaintiffs  
3 contend that at least five arbitration procedures mandated by the contract are harsh  
4 and one-sided, rendering the arbitration forum itself to be procedurally unfair. See  
5 Section F, above. Plaintiffs cannot escape these unfair waivers of their rights,  
6 because the arbitration clause also unconscionably mandates that the contract  
7 controls over the arbitration forum's own procedures. Now, defendants insist that  
8 the delegation clause requires plaintiffs to enter this same forum, under the same  
9 unfair handicaps, to decide arbitrability, when the forum stands to gain financially  
10 by turning down plaintiffs' challenges. As one treatise explained about this Catch-  
11 22 situation, "It would be unfair, after all, to require a party to submit to an unfair  
12 arbitral forum for the purpose of demonstrating that the arbitral forum is unfair."  
13 National Consumer Law Center, Consumer Arbitration Agreements, § 2.2.3 (7<sup>th</sup> Ed.  
14 2015).

15 H.   The Complaint Should Not Be Dismissed

16           While the court may have discretion to dismiss instead of stay the action,  
17 doing so would only complicate this case for the parties and the court. If the court  
18 were to enter a dismissal with or without prejudice after compelling arbitration, that  
19 decision would be immediately appealable, requiring plaintiff to file an appeal  
20 while the arbitration is ongoing. Green Tree Financial Corporation v. Randolph,  
21 531 U.S. 79 (2000); Interactive Flight Technologies, Inc. v. Swiss Air Transp. Co.,  
22 249 F.3d 1177, 1179 (9<sup>th</sup> Cir. 2001).

23           A stay and retention of jurisdiction, if arbitration is ordered, is more practical  
24 for several reasons: (1) in case the arbitration cannot proceed due to nonpayment of  
25 arbitration fees; (2) to confirm the arbitration award, so that the prevailing party  
26 does not have to open a new court case to enforce the award; and (3) to determine  
27 any non-arbitrable issues in court, if the arbitrator or court rules that there are such  
28 issues.

1 III. CONCLUSION

2 For all of the foregoing reasons, plaintiffs request that the defendants' motion  
3 to compel arbitration be denied.

4  
5 Dated: March 1, 2019

Respectfully Submitted,  
TRUEBLOOD LAW FIRM

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7  
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9  
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